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# Sales—Transfer of Title—Federal Retailers' Excise Tax.—Around The World Shoppers Club v. United States

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Here, although this court has reviewed rate determinations de novo when the charge of confiscation is made,[18] it does not appear that the court did in fact in this instance review de novo. It must be admitted that it was perhaps close to de novo review,[19] for the plaintiffs had the burden of proof.[20] But even by a *rigid* substantial evidence test the allocation could not stand. Because the commissioner's duties were outined,[21] the court found it easy to say: "we have mentioned that there is no *finding* that the rate base . . . which the commissioner's order shifts from intrastate to interstate . . . are not employed and incurred in the operation of the intrastate plant."[22] De novo review is not to be condemned merely because the Supreme Court now provides for less review, for although perhaps not constitutionally necessary, there is nothing to restrict a state from providing de novo review or substituting its independent judgment.[23]

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**Sales—Transfer of Title—Federal Retailers' Excise Tax.—*Around The World Shoppers Club v. United States.*[1]**—Around The World Shoppers Club (Club) was an enterprise to which persons subscribed to receive "gifts" which were shipped directly to them from a different foreign country for each month of their subscription. To join, the persons submitted to the Club an application for membership and payment in advance for the "gifts." Upon acceptance of the application, the Club sent a label bearing the member's name and address to foreign suppliers which had agreed with the Club to ship "gifts" to its members. The Club handled all communications both with its members and with the foreign suppliers. The suppliers were responsible only to the Club for adjustment of any claims against them and received payment for the "gifts" from the Club. The Club brought suit to recover a part payment made under a Federal Retailers' Excise Tax[2] assessment on the value of the "gifts" which had been sent to its members. The U.S. District Court, in granting a government counterclaim for the unpaid

[18] Supra note 6.

[19] Supra note 1, at 1032, "So that we will not be misunderstood we add that the evidence affords no basis for determining the value of a call or of saying that an interstate call has any greater value than an intrastate call."

[20] Ore. Rev. Stat. § 757.585 (1959). But see supra note 1, at 1025, "The company's witness established at least *prima facie* that the part of the plant represented by the sum of $6,194,114 was devoted to intrastate service . . ." (emphasis added).

[21] Ore. Rev. Stat. § 757.055 (1959), "The Commissioner shall value all the property of every public utility used or useful for the convenience of the public . . . ," Ore. Rev. Stat. § 756.550(3) (1959), "After the completion of the taking of evidence and within a reasonable time the commissioner shall prepare and enter findings of fact and conclusions of law upon all the evidence received in the matter and shall make and enter his order thereon. . . ."

[22] Supra note 1, at 1036.

[23] See Opinion of the Justices, supra note 15.

[1] 198 F. Supp. 773 (D.N.J. 1961).

[2] 68A Stat. 473 (1954), 26 U.S.C. §§ 4001-057 (1958).

balance of tax, HELD: The transactions between the Club and its members on the one hand, and between the Club and the suppliers on the other, involve two sales of the goods. Accordingly, title to the goods passed from the suppliers through the Club to the members; the Club being in effect a retailer. Under the Uniform Sales Act[3] of New Jersey, where the Club is located, title to the goods passed when they were delivered to the members within the United States. Thus, the second sale was subject to the Federal Retailers' Excise Tax.

In the instant case, the Club resisted the tax on two grounds. First, that it never took title to the goods which were shipped directly by the foreign suppliers to members in this country, and secondly, that the tax, which was imposed upon sales[4] made within the United States, was not applicable in this situation since title to the goods here involved passed to the members when the goods were mailed in the foreign country. Quaere: Upon what theory did the Club initially determine that it was not required to collect and pay the tax?[5]

The facts of this case can easily be construed to fit a number of capacities in which the Club may be deemed to have operated. The Club may be viewed as an agent for many prinicipals, its members, who employ the Club to deal with foreign suppliers in procuring goods to be sent to the member-principals. As such, the Club, if it had title at all,[6] would be taking it in the

[3] N.J. Stat. Ann. §§ 46:30-1, 7(1), 23, 25, rule 5 (1937). Although this statute is entitled the Uniform Sale of Goods Law in New Jersey, its provisions are substantially identical with the provisions of the Uniform Sales Act (hereinafter cited as U.S.A.).

[4] Indian Motorcycle Co. v. United States, 283 U.S. 570 (1931), where the Court, in adhering to the principle that the instrumentalities, means and operations whereby states exercise their functions of government are exempt from taxation by the United States, refused to sanction the addition of excise taxes to the cost of a motorcycle which was sold to a municipal corporation of a state because the tax "is laid on the sale, and on that alone" (Id. at 574).

[5] Although the retailer is primarily liable for the tax, it would seem the Club must have had good cause to believe it was not acting as a retailer, for this type of assessment is usually passed on to the consumer. The tax regulations forbid disguising this impost as part of the sales price. However, in the usual case, the assessment is itemized as an addition to the sales price, and thus validly passed to, and assumed by, the consumer. Hence, even if the Club had thought it was accountable for the levy, no financial detriment would have resulted to the Club itself.

In examining the fact situation of the principal case it appears that a loose analogy may be drawn between it and cases which involve a state's endeavor to make a foreign corporation its agent and insurer for the collection of domestic sales taxes. The issues in the latter cases usually revolve around the questions of whether the foreign corporations are sufficiently present within the taxing state so that such an agency may be constitutionally imposed upon them, and/or whether the sale took place within the taxing state. McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33 (1940); McGoldrick v. Felt, 309 U.S. 70 (1940); Compagnie Generale Transatlantique v. McGoldrick, 309 U.S. 430 (1938); Montgomery Ward & Co. v. State Commissioner, 156 Kan. 408, 133 P.2d 1008 (1943). In the instant case there was no problem of diversity, for it was a federal tax on a New Jersey concern. However, the problem of where the sale actually took place was in issue.

[6] For a consideration of this point see Justice Livingston's opinion in King & Boozer v. State, 241 Ala. 557, 3 So. 2d 572 (1941), cert. granted, 314 U.S. 599 (1941), rev'd, 314 U.S. 1 (1941).

capacity of agent for its member-principal. To apply a retailers' tax to such an arrangement is, at best, difficult. In effect, the foreign supplier would be the retailer,[7] and since it is located outside the jurisdiction of the United States it could not be liable for a United States retailers' tax. The fact that the Club itself is bound to pay the foreign supplier is consistent with agency principles.[8] It is true that the scope of the agent's authority would be extremely broad, but this too is consistent with agency concepts.[9]

The second theory under which the principal case may be explained differs only slightly from the first. This would be a broker-principal relationship. A broker operates much as an agent does, but usually with more limited powers.[10] Even though strict adherence to the general rule that a broker has no authority to contract in his own name[11] would preclude treating the Club as a broker, one might argue that from the very essence of the Club's nature and activities in soliciting many members from the general public an implied authority to contract in its own name necessarily resulted.[12] Under this theory also, the Club, if it did acquire title,[13] would have it in the capacity of broker for the members and thus could not be subject to a retailers' tax.

Although the court did take note of the fact that the foreign suppliers assumed the risk for the goods while in transit, this is not of controlling significance. While risk usually follows title,[14] title does not necessarily follow risk.[15] Thus, transition of title from the foreign supplier to the Club members at the instant of delivery to the post office would not conclusively preclude the foreign supplier's assumption of risk for the goods to their destination. Hence, it is difficult to see how this fact would affect the contentions of either party.

It seems, however, that the most plausible position is that which was accepted and adopted by the court in the principal case. When the Club

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[7] See Roland Electric Co. v. Walling, 326 U.S. 657 (1946), which considers at length the distinctions between "wholesale" and "retail."

[8] Accord, Benton v. Campbell, Parker & Co., [1925] 2 K.B. 410.

[9] McNulty v. Dean, 154 Wash. 110, 281 Pac. 9 (1929).

[10] Lawrence Gas Co. v. Hawkeye Oil Co., 182 Iowa 179, 165 N.W. 445 (1917); J. M. Robinson & Co. v. Corsicana Cotton Factory, 124 Ky. 435, 99 S.W. 305 (1907); French v. Toledo, 81 Ohio St. 190, 90 N.E. 160 (1909). See generally 8 Am. Jur. Brokers § 2 (1937), and cases cited therein.

[11] Haas v. Ruston, 14 Ind. App. 8, 42 N.E. 298 (1895), where a broker who was employed to negotiate a sale of flour made a contract for its sale in his own name. Since he had acted in this manner without the knowledge or consent of his principal, the court held he could not recover from the principal the damages paid by him to the buyer upon his failure to perform under the contract.

[12] Restatement (Second), Agency § 34 (1958): "An authorization is interpreted in the light of all accompanying circumstances, including among other matters:

(a) the situation of the parties, their relation to one another, and the business in which they are engaged . . . ."

[13] Supra note 6.

[14] 1 Uniform Laws Ann. § 22 (1950); Uniform Commercial Code § 2-401(2) (hereinafter cited as UCC); 2 Williston, Sales § 302 (rev. ed. 1948).

[15] Ibid.

accepted an application for membership, a contract for the sale of future goods[16] arose with the Club as seller, and the applicant was buyer. Since the member was to *receive* a gift each month for the period of his subscription, it appears title to the goods would not pass, and performance of the contract would not be complete until the goods were delivered. This conclusion would be inescapable under either the common law or the Uniform Sales Act.[17] The agreements with the foreign suppliers are the means through which the Club effectuates compliance with its obligations to the Club members. The legal effect of these agreements, as the court held, is that of a purchase contract by the Club. The transactions between the Club and its members are contracts of sale of future goods[18] which become retail sales upon delivery to the members, and thus, subject to the Federal Retailers' Excise Tax.

It is significant to note that, once the facts are so construed, a similar result would have been reached had the Uniform Commercial Code been applicable.[19]

DAVID W. CARROLL

**Securities—Liability of an Insider and His Investment Partnership for Profits Realized on a Short Swing Transaction—Section 16(b) of the Securities Exchange Act of 1934.—*Blau v. Lehman.*[1]**—Petitioner Blau, a stockholder in Tidewater Associated Oil Company, brought an action on behalf of his corporation to recover "short swing" profits from the respondents under section 16(b) of the Securities Exchange Act of 1934.[2] The respondents were Lehman Brothers, a partnership engaged in investment banking and the brokering and trading of securities, and Joseph A. Thomas, a member of Lehman Brothers and a director of Tidewater. The evidence showed that Lehman Brothers had earned profits out of short swing transactions in Tidewater securities while Thomas was a director. As to charges of deputization and wrongful use of "inside" information by Lehman Brothers, the evidence was in conflict. There was testimony that Thomas

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[16] N.J. Stat. Ann. §§ 46:30-1, 11(1) (1937).

[17] U.S.A. § 19 is declaratory of the common law on this point. Cassinelli v. Humphrey Supply Co., 43 Nev. 208, 183 Pac. 523 (1919); 2 Williston, op. cit. supra note 14, at § 279a. If a contrary intent were not manifested, certain guides were established for ascertaining intent. As codified by the U.S.A. one rule stated: "If a contract to sell requires the seller to deliver the goods to the buyer . . . the property does not pass until the goods have been delivered. . . ." 1 Uniform Laws Ann. § 19, rule 5.

[18] Supra note 16.

[19] UCC § 2-401(2): "Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods . . . (b) if the contract requires delivery at destination, title passes on tender there." New Jersey has adopted the Uniform Commercial Code; it is effective January 1, 1963. N.J. Stat. Ann. §§ 12A:1-101 to 12A:10-106 (1961).

[1] 82 S. Ct. 451 (1962).

[2] 48 Stat. 896 (1934), 15 U.S.C. § 78p(b) (1958).